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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 160.

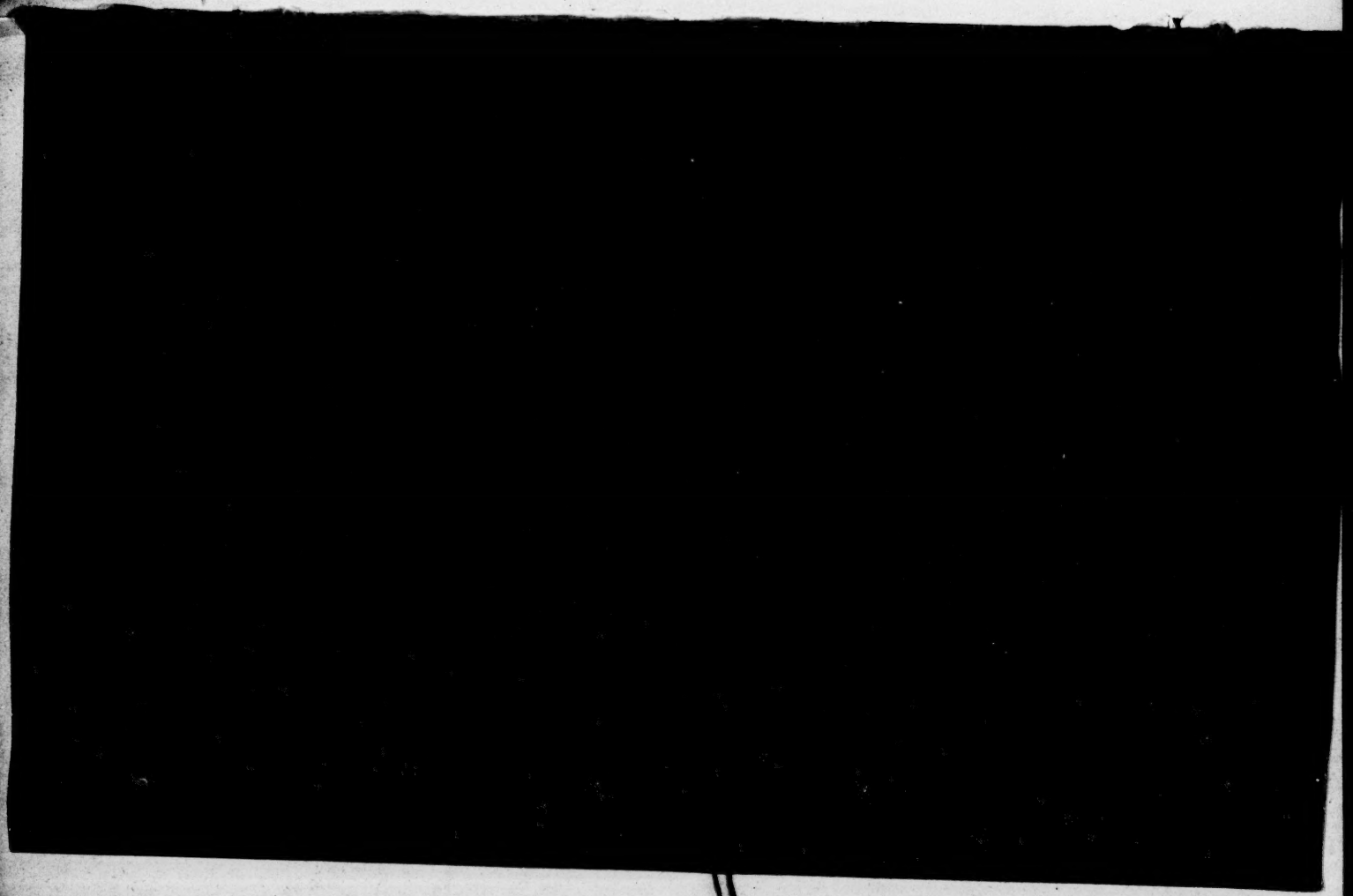
WILLIAM A. CHEATHAM AND ADILICIA CHEATHAM, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

HENRY L. NORVELL, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED MARCH 16, 1874.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district Middle Tennessee, greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said circuit court before you, etween William A. Cheatham and wife, Adelicia Cheatham, plaintiffs, and Henry L. Norvell, collector, defendant, a manifest error hath happened to the great damage of the said William A. Cheatham, as by complain*ant* appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, eldest associate- justice of said Supreme Court, the 21st day of November, in the year of our Lord one thousand eight hundred and seventy-three.

2 [SEAL.] E. R. CAMPBELL,
Clerk of the Circuit Court for the Middle District of Tennessee.

3 UNITED STATES OF AMERICA, *ss:*

To Henry L. Norvell, collector, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Middle Tennessee, wherein William A. Cheatham and wife, Adilecia Cheatham, are plaintiffs, and you are the defendant in error, to show cause, if any there be, why the judgement in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, eldest associate justice of said Supreme Court of the United States, this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-three.

CONNALLY F. TRIGG,
U. S. District Judge, Presiding.

I acknowledge service of the above citation and the receipt of a copy of the same. Nashville, Tennessee, November 21, 1873.

A. M. HUGHES,
U. S. Atty., and Atty. for Deft.

4 MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States, begun and held at the capitol of said State, in Nashville, on the third Monday, being the 20th day, of October, in the year of our Lord eighteen hundred and seventy-three, and of the Independence of the United States the 98th.

Present, the Hon. Connally F. Trigg, United States district judge for the several districts of Tennessee.

Present, also, Edward R. Campbell, esq., clerk of said court, and Wm. Spencer, esq., marshal of said district.

The following proceedings were had, to wit:

On the 30th day of January, 1869, a petition for a certiorari was filed; which is as follows:

To the judges of the circuit court of the United States for the middle district of Tennessee:

The petition of Henry L. Norvell, collector of U. S. internal , respectfully showeth, as follows:

Petitioner, as such collector, was appointed under and has ever acted under and by authority of the act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, and of the subsequent acts of Congress in addition thereto and in amendment
5 thereof. As such collector, it was his duty under said acts of Congress to collect the income-tax assessed by the assessor for his collection-district upon William A. Cheatham and Adelecia, his wife, or rather the latter, for the year 1864. Said income-tax had been duly assessed upon said persons for said year, and the same was duly collected by petitioner, as the duties of his said office required that it should be. The tax was, however, paid by said persons unwillingly, under protest, they imagining that they did not owe the same and were not liable to the amount thereof, as to which petitioner is advised and believes they were wholly in error. A portion of the money so paid and collected was the penalty legally imposed upon the parties for their default in promp'ly complying with the requirements of the laws of Congress relating to said matter. Said Cheatham and his said wife, on January 15, 1869, sued out a writ of trespass on the case on promises against petitioner, in the circuit court of Davidson County, Tennessee, claiming from him damages in the amount of forty-thousand dollars. Said writ, which was returnable to the January term, 1869, of said court, did not indicate the cause of said action, nor does the declaration, filed on Jan. 26, 1869, shed any light upon this matter, the same containing simply a count for money had and received to the use of said plaintiffs, under which divers and sundry matters might be given in evidence. Nevertheless petitioner avers that said suit was brougnt solely to recover from him the amount of said tax so paid to him as such collector as aforesaid. Said
6 writ was served upon petitioner within the district aforesaid. The premises considered, petitioner prays that a writ of certiorari issue to said circuit court of Davidson County, requiring said court to send to the circuit court of the United States the record and proceedings in said cause, and that thereupon said cause be docketed in said U. S. court and thereafter proceeded in as a cause originally commenced in said court.

R. McP. SMITH,
U. S. Dist. Atty.

Affiant makes oath that the matters set forth in the foregoing petition are true, to the best of his knowledge, information, and belief.

H. L. NORVELL.

Sworn to and subscribed to before me, Jan. 27, 1869.

R. McP. SMITH,
U. S. Circuit Court Comm'r.

I hereby certify that I have, as counsel for the foregoing petitioner, examined the proceedings against him mentioned in the foregoing petition, and carefully inquired into all the matters set forth in said petition, and that I believe the same to be true.

January 27, 1869.

R. McP. SMITH,
U. S. Attorney.

On the 30 day January 1869, a certiorari was issued; which is as follows:

The President of the United States of America to the Hon. Eugene Cary, judge of the circuit court of Davidson County, in the
7 State of Tennessee, greeting:

A petition, duly sworn and certified to, having been filed in the U. S. circuit court for the middle district of Tennessee, by Henry L. Norvell, collector of U. S. internal revenue, &c., stating that a suit is pending and undetermined in said State court, brought by Wm. A. Cheatham and wife against him as such collector, claiming from him $40,000 damages; which suit, it is further alleged, was so brought solely to recover from said collector the amount of income-tax and penalty duly collected by him from said persons in accordance with the U. S. internal-revenue laws, (being, however, paid under protest;) the process issued on said suit being served upon said collector in this judicial district, said petition praying to have said suit removed into the said U. S. court, &c.:

Now, therefore, you are hereby required to cause to be sent to said U. S. court the record and proceedings in said cause, certified under your seal, to be therein proceeded in as if therein originally commenced. And you are also further required to stay all further proceedings in said cause in said State court.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Nashville, this the third Monday in October, 1868, and the 93d year of the Independence of the United States.

[SEAL OF THE U. S. CIR. CT.] E. R. CAMPBELL, *Clerk.*

Upon the back of said certiorari is endorsed the following return of the marshal:

8 Came to hand same day issued. Executed upon Eugene Cary, esq., judge of the circuit court of Davidson County, Tennessee, by making known to him the contents of the within certiorari, Feb'y 2, 1873.

E. R. GLASCOCK,
U. S. Marshal.

On the 10th day of Feb'y, 1869, a transcript of the record and proceedings had in the circuit court of Davidson County, Tennessee, was filed; which is as follows:

STATE OF TENNESSEE:

Pleas at the court-house, in the city of Nashville, county of Davidson, and State aforesaid, on the fourth Monday, being the 25th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and in the 93rd year of American Independence. Present the Hon. Eugene Cary, one of the judges of the circuit courts of the State of Tennesse, and assigned to hold the circuit courts of the nineteenth judicial circuit of said State.

State of Tennessee to the sheriff of Davidson County, greeting:

You are hereby commanded to summon Henry L. Norvell, U. S. col-

lector of income-tax, if to be found in your county, to be and appear before the judge of the nineteenth circuit, at the next circuit court to be held in the county of Davidson, at the court-house in the city of Nashville, on the fourth Monday in January next, then and there to answer
William A. Cheatham and Adelecia Cheatham, his wife, in a plea
9 of trespass on the case on promises, to their damage forty thousand dollars. Herein fail not, and have you then and there this writ.

Witness David C. Love, clerk of our said court, at office, this first Monday in September, A. D. 1868, and in the ninety-third year of our Independence.

DAVID C. LOVE, *Clerk.*
By J. F. HIDE, *D. C.*

Know all men by these presents that I, William F. Cooper, am held and firmly bound unto Henry L. Norvell, U. S. tax collector, in the sum of two hundred and fifty dollars, to be void on condition that William A. Cheatham and Adelecia, his wife, do pay and satisfy all costs that may accrue in their behalf in the prosecution of a suit this day commenced by them in the circuit court of Davidson County, Tennessee, against the said Norvell.

Witness my hand this the 15th day of Jan'y, 1869.

W. F. COOPER.

Issued 15th day of January, 1869; came to hand and executed January 16, 1869, by reading to Henry L. Norvell, U. S. collector of income-tax. January 16, 1869.

C. M. DONALDSON, *Sheriff.*

Declaration.

Circuit court, January term, 1869.

STATE OF TENNESSEE,
Davidson County:

William A. Cheatham and Adelecia Cheatham, his wife, by attorney, complain of Henry L. Norvell, U. S. collector of income-tax, who has been summoned to answer them in a plea of trespass on the case
10 on promises, to their damage forty thousand dollars.

For that whereas the said defendant heretofore, to wit, on the day of , 18 , was indebted to the said plaintiff in the sum of forty thousand dollars for so much money by the said defendant had and received to and for the use of the said plaintiffs, and, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at Davidson aforesaid, undertook and then and there faithfully promised the said plaintiffs, to pay them the said sum of money when he, the said defendant, should be thereunto afterwards requested; nevertheless, the said defendant, not regarding his promises and undertakings, but contriving and fraudulently intending craftily and subtlely to deceive and defraud the said plaintiffs in this behalf, hath not as yet paid the said sum of money, or any part thereof, to the said plaintiffs, although often requested so to do, and the said defendant to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to plaintiffs' damage forty thousand dollars; and therefore they sue.

W. F. & H. COOPER,
Attorneys for Plaintiffs.
HIDE, *D. C.*

Filed January 26, 1869.

Defendant's plea.

Circuit court of Davidson County, January term, 1869.

W. A. CHEATHAM & WIFE
vs.
HENRY L. NORVELL, COLLECTOR, &C.

Defendant, for plea to plaintiffs' declaration, says that he did
11 not undertake and promise as therein alleged, and of this he puts himself upon the country.

R. McP. SMITH,
U. S. Atty., for Defendant.
HIDE, *D. C.*

Filed January 29, 1869.

W. A. CHEATHAM ET AL.
vs.
HENRY L. NORVELL, U. S. TAX-COLLECTOR.

At the January term, 1869, of the circuit court, and on the 2 day of Feb'y, 1869, the following entry is made, to wit:

In this cause notice having been issued and served requiring this cause to be removed from this court to the U. S. circuit court for the middle district of Tennessee, there to be tried, it is ordered by the court that the clerk of this court make out and certify said cause to said U. S. circuit court for the middle district of Tennessee.

STATE OF TENNESSEE:

I, David C. Love, clerk of the circuit court for Davidson County, State aforesaid, do hereby certify that the foregoing is a correct transcript of the record and proceedings had in said court, wherein W. A. Cheatham et al. plaintiffs, and Henry L. Norvell, U. S. tax-collector, defendant, as the same remains of record and on file in my office.

SEAL OF THE CIRCUIT COURT OF DAVIDSON CO., TENN.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in Nashville, the 4th day of Feb'y, in the year 1869, in the 93rd year of American Independence.

DAVID C. LOVE, *Clerk.*

12 On the 25th day of October, 1873, the following notice of defences was filed by the defendant:

W. A. CHEATHAM & WIFE
vs.
HENRY L. NORVELL, COLL'R.

To Hon. W. F. Cooper and John C. Gant, attorneys for W. A. Cheatham & wife:

You are hereby notified that the defendant, H. L. Norvell, in the case of W. A. Cheatham & wife vs. H. L. Norvell, pending in the circuit court of the United States for the middle district of Tennessee, will rely under the general issue upon the following defences:

First. That the taxes were properly assessed.

Secondly. That no appeal was made to the Commissioner of Internal Revenue of the United States in manner and form as required by law.

Thirdly. That, if there was an appeal to the Commissioner, suit was not brought within six months from the date of the decision of the Commissioner, and within one year from the date of filing the appeal.

A. M. HUGHES,
Atty. for Deft.

On the 6th day of November, 1873, an entry was made on the minutes; which is as follows:

WILLIAM A. CHEATHAM AND HIS WIFE, Adelecia Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR.

Came the parties, by their attorneys, and came also a jury of good and lawful men, to wit: Wm. Anderson, E. A. Mathis, C. W. Smith, John C. Webb, John A. Hamlin, Wm. Morton, Joseph Whelep, A. B. Payne, J. B. Clements, C. L. Wilcox, Theo. Knoch, and D. M. Logan,
13 who, being elected, tried, and sworn well and truly to try the issue joined, after hearing a portion of the evidence, were respited until to-morrow morning, at 10 o'clock.

On the 7th day of November, 1873, an entry was made on the minutes; which is as follows:

WILLIAM A. CHEATHAM AND WIFE, Adelecia Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR.

Came again the parties, by their attorneys, and came again also the same jury empannelled in this cause on yesterday, who, after hearing the balance of the evidence and the argument of counsel, were respited until to-morrow morning, at 10 o'clock.

On the 8th day of November, 1873, an entry was made on the minutes; which is as follows:

WILLIAM A. CHEATHAM AND WIFE, Adelecia Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR.

Came again the parties, by their attorneys, and came again also the same jury heretofore empannelled in this cause, and said jury was thereupon respited until Monday morning next, at 10 o'clock.

On the 10 day of November, 1873, an entry was made on the minutes; which is as follows:

14 WILLIAM A. CHEATHAM & WIFE, Adelecia Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR.

Came again the parties, by their attorneys, and came again also the same jury heretofore empannelled in this cause, who, after hearing the

charge of the court, upon their oaths do say that they find the issues in favor of the defendant. It is therefore considered by the court that the defendant go hence without day, and recover of the plaintiffs and W. F. Cooper, their security on the procecution-bond in this cause, the costs of this cause, and that fi. fa. issue for the same. Thereupon the plaintiffs, by their attorneys, moved the court to set aside the verdict of the jury and grant them a new trial; which motion was continued over for argument.

On the 21 day of November, 1873, an entry was made on the minutes; which is as follows:

WILLIAM A. CHEATHAM & WIFE, ADELECIA Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR.

Came the parties, by their attorneys, and the motion of the plaintiffs for a new trial was, by the court, overruled; and thereupon the plaintiffs, by their attorneys, tendered to the court their bill of exceptions to the rulings of the court at the trial; which was signed and sealed by the court, and ordered to be made a part of the record of said cause.

On the 21 day of November, 1873, a bill of exceptions was filed; which is as follows:

15 W. A. CHEATHAM AND HIS WIFE, ADelecia Cheatham,
vs.
HENRY L. NORVELL, COLLECTOR, &C.

Be it remembered that on this, and a former day of this, the October term, 1873, of the circuit court of the United States of America for the middle district of Tennessee, at Nashville, this cause came on for trial before the honorable Connally F. Trigg, judge of the district court of the United States for the middle district of Tennessee, and holding the circuit court of the United States for said middle district of Tennessee, at Nashville, and a jury of said middle district, when the following proceedings were had, to wit:

After the pleadings in the cause were read to the court and jury, the plaintiffs, by their attorneys, read in evidence to the court and jury, first, the depositon of Adelecia Cheatham, one of the plaintiffs in the cause, marked "No. 1," and the Exhibits A, B, C, & D, thereto attached, as a part thereof; all made a part of this bill of exceptions.

Deposition of Adelecia Cheatham.

Question 1. Are you the wife of Dr. Wm. A. Cheatham, and one of the plaintiffs in the above suit?

Answer. I am the wife of W. A. Cheatham, and one of the plaintiffs in the above suit.

Question 2. At what time did you intermarry with Dr. Cheatham, and were you at the time of such intermarriage the widow of the late Joseph A. S. Acklin?

Answer. I intermarried with the plaintiff, Dr. Wm. A. Cheatham, on

the 18th day of June, 1867, and at the time of said marriage I was the widow of the late Joseph A. S. Acklin.

Question 3. Of what State was Col. Acklin, your former husband, a citizen at the time of his death; and for how long a time previous had he been such a citizen?

16 Answer. Joseph A. S. Acklin, my late husband, was a citizen of the parish of West Feliciana, in the State of Louisiana, at the time of his death, which occurred on the 17 day of September, 1863. He died intestate in the State of Louisiana, leaving this deponent his widow, and leaving Joseph H. Acklin, William H. Acklin, Claude Acklin, and Pauline Acklin, his only children and heirs at law. Said Col. Acklin had resided in the State of Louisiana, from some time in the year 1849, up to his death; but on the 6th day of April, 1852, he filed his petition in the 7th judicial district court of said State for the parish of West Feliciana, and by the judgment of said court he was domiciled and made a citizen of the State of Louisiana. And deponent states, in this connection, that while she was the widow of her first deceased husband, Isaac Franklin, deceased, and before her marriage with Col. Joseph A. S. Acklin, to wit, on the 22 day of May, 1847, she filed her petition in said court, and by the judgment thereof she was domiciled and made a citizen of said State of Louisiana. Certified copies of said petitions and proceedings in said court are hereto annexed, properly certified, as she believes, marked "Exhibits A & B," and made a part of this deposition; and I and my said husband, Col. Acklin, continued to reside and to be citizens of the State of Louisiana up to the time of his death, as aforesaid. We had a summer residence near the city of Nashville, Tennessee, where we stayed usually during the warm sickly season of the year, to avoid the diseases incident to the climate in the State of Louisiana.

Question 4. This suit is brought to recover money paid by you and Dr. Cheatham, under protest, to the defendant, as collector of
17 the United States internal revenue for the district of this State, Tennessee, including Davidson County. Is this so?

Answer. This suit is brought to recover the money paid by me and my husband, Dr. Cheatham, under protest, to the defendant, as collector of internal revenue for the 5th district of Tennessee, including Davidson County. It was paid in the year 1868.

Question 5. State whether the tax thus paid was the tax upon your income, and for what year.

Answer. The tax paid to the defendant was the sum of *thirty*-nine thousand nine hundred and seventy-one $\frac{91}{100}$ dollars, ($29,971.91,) and was assessed and collected from me under protest, as tax upon my income for the year 1864.

Question 6. From what source was the income derived upon which the tax thus paid was assessed? Was it from any and what crops raised in this State or some other, and what other State?

Answer. It was taxed on my income for the year 1864, upon my share of the proceeds of the crops of cotton raised in the year 1861 and 1862, upon certain plantations in the parish of West Feliciana, in the State of Louisiana, in which deponent had an undivided interest in said plantations; and the other undivided interest belongs to her [my] four children, or perhaps in reality to only two of her [my] children, when said cotton was raised. The plantations were carried on, however, under the management and control of her late husband, Col. Joseph A. S. Acklin; said two crops of cotton were held over by reason of the late war, and remained upon the said plantations unsold at the

death of Col. Acklin. After his death and after being appointed tutrix of said children and heirs of Col. Acklin, and after getting the proper permits from the United States authorities, I undertook, in the
18 latter part of 1863, to get said crops of cotton out from said plantations and to market, and after great expense, trouble, and delay, I and my agents succeeded in getting said cotton removed to the city of New Orleans, Louisiana, in the early part of the year 1864, where I sold more than half the cotton and shipped the remainder to England, where it was sold.

Question 7. Were these crops raised in the year 1864, and, if not, in what year or years were they raised, by whom, and under what circumstances?

Answer. I have stated that said cotton was raised on said plantations by Col. Acklin, in the years 1861 & 1862; the crop of 1861 was ginned and baled on the plantations by Col. Acklin; but the crop of 1862 was in the seed; on account of the war, Col. Acklin was not able to have it ginned and baled. I caused it to be ginned and baled after its removal to the city of New Orleans, La.

Question 8. Please state the circumstances under which you succeeded in carrying these crops to market, and when, and the expenses which you had to pay in accomplishing this object.

Question 9. State the circumstances under which the assessment was made, and when, and what action did you take when the original assessment was made; did you file a petition for a revision of the assessment; were the statements in that petition correct? Repeat these statements, or make a copy of the petition a part of your deposition.

Answer. In answer to the 8th & 9th interrogatories., I will try to answer both together; and I think that I can present the whole case better by first stating that, about the 15th May, 1867, I was notified by the defendant, Norvell, as collector of internal revenue of the 5th district
19 of Tennessee, that a tax had been assessed against me, on income, for the year 1864, amounting to ninety-nine thousand seven hundred and twenty-six dollars, ($99,726.00) and payment thereof was demanded. Not being able to get a re-assessment made, or said assessment set aside, diminished, or abated by the defendant in any manner, she and husband appealed to the Department at Washington City for relief. She forwarded her petition to the Department at Washington after she and husband had given a bond and security as required by defendant. Said petition was sworn to on the day of 1867, and forwarded to the Department at Washington, a true copy of which is hereto annexed, except the signatures of herself and husband, Dr. Cheatham, are not to said copy, nor is the affidavit to said petition forwarded to said copy retained, but with these exceptions the copy hereto annexed, marked "Exhibit C," is a true copy, and is made a part of this deposition. In said copy marked "Exhibit C," the facts are substantially stated in it and schedule No. 1 to said copy, and gives a full answer to said interrogatories 8 & 9 as deponent can now give to said interrogatories. Said petition and schedule sets out the number of bales of cotton raised in 1861 and 1862, for how much the cotton was sold, the amount of the mortgage-debt upon it paid by deponent, the expenses of getting said cotton to market, bagging, rope, baling, &c. It will be seen from said copy of said petition and schedule Exhibit No. 1 thereto, that the net proceeds of said cotton is put down at $758,674.41. That the expenses of getting said cotton to market was
20 $113,995.34; to this must be added dues to U. S. Government, paid:

Internal revenue	$49,197 40
Excise-tax	24,598 70
Hospital-fees	14,116 80
Making	$201,908 24

But in making out said schedule of expenses, various items of expenses were omitted, to wit, $5,000.00 paid Mrs. S. A. Carter, whose services were of great value in getting said cotton out and to market; and her board and travelling expenses were also paid. There were other expenses paid out of the proceeds of said cotton. She also paid other debts of her late husband, Col. Acklin, out of the proceeds of said cotton, amounting in the aggregate to about $16,000.00, which had been paid through her agents and were omitted to be stated in said petition or put down in said schedule. The balance of the items in said schedule are estimates of the probable expenses incident to the carrying on said plantations, and feeding, clothing, medical bills, &c., for the negro slaves, and for the sustenance of the live stock on said plantations for the years 1861, 1862, 1863, & 1864. As to the latter, she has no means of stating the actual and precise amounts, but she believes they approximate the correct amounts. But in all the other respects the facts set forth in said petition and schedule, or appeal to the Department at Washington, she believes to be substantially correct. Deponent believed she was entitled to one-half the net proceeds of said cotton after all of the community debts of herself and Col. Acklin were paid, and her said four children to the other half, to be equally divided between them; and that by law she was not bound to pay any tax or duty
21 upon her half, and so, in substance, stated to the Department in said petition, and so asked them to decide. But if the law was otherwise she insisted that said assessment was too high and unjust; and she prayed that said assessment be set aside and her case investigated, and a new assessment made by the local assessor at Nashville, upon a proper basis, making the deductions prayed for. The Department at Washington decided, in substance, that deponent was bound to pay income-tax for the year 1864 upon her share of the proceeds of said cotton; but that said assessment of $99,726.00 was erroneous, and ordered it to be set aside, and directed the local assessor at Nashville to make a new assessment at Nashville, &c.

Question 10. State whether the final assessment made, and which was paid by you under protest as aforesaid, was not as follows:

Income tax on $4,400 at 5%	$220
" " 297,519.18 at 10%	29,751 91
	$29,971 91

Answer. The local assessor at Nashville, Tennessee, did make a new and final assessment against deponent on the day of 1868, as tax upon deponent's share of said cotton for the year 1864, as follows:

Income tax on $4,400.00 @5%	$220 00
" " " 297,519.18 " 10%	29,751 91
	$29,971 91

Question 11. Was the payment of this assessment made under protest? If so, make the protest a part of your deposition.

Ans. 11. The payment of this assessment was made under protest on

or about the 23rd July, 1868, a true copy of which is hereto annexed, marked "Exhibit D,' and made a part of this deposition.

Ques. 12. You have stated that the crops on which the assessment was made were raised in the parish of West Feliciana, State
22 of Louisiana, in the years 1861 and 1862. What number of bales of cotton produced the income thus assessed, and of this number, how many bales were of the crop of 1861, and how many of the crop of 1862?

Ans. 12. The crops of cotton in 1861 and 1862 produced twenty-eight hundred and eighty-seven bales, (2,887,) and I believe over two thousand bales were of the crop of 1861, and the residue were of the crop of 1862.

Ques. 13. To whom did these crops or their proceeds belong, under the laws of Louisiana?

Ans. 13. I have alway' been informed, and believed, that said crops of cotton belonged to the late Col. Acklin, and the proceeds belonged to his estate after his death, by the laws of the State of Louisiana, and that by the laws of said State, after the payment of the debts of Col. Acklin and the community debts, one-half the net proceeds belonged to me as his wife and widow, and the other half of said net balance belongs to his said four children and heirs, to be equally divided between them. This is, however, a legal question, to be determ'ed by the laws of the State of Louisiana, and I may be in error.

Ques. 14. These crops were raised by the labor of slaves, and the use of horses, mules, oxen, cattle, &c.; what was the cost of the subsistance and clothing of these slaves, and of the subsistance of the horses, mules, oxen, cattle, &c., for the years 1861 and 1862, and how and by whom was this cost paid?

Ans. 14. Said crops of cotton were raised by the labor of slaves, and the use of horses, mules, oxen, cattle, &c., farming-tools, implements, &c., but I am not able to state the cost of the subsistance and clothing of these slaves, their medical bills, &c., and of the subsistance of the horses, mules, oxen, and other cattle, and the saleries of overseers, &c., for said years 1861 and 1862; but I think my petition to the
23 Department and schedule Exhibit No. 1 thereto, above referred to and made a part of this deposition marked "C," states the facts as fully as I can, and I believe they approximate to the truth, and therefore, without repeating the various items in detail, I refer to said petition and schedule marked "Exhibit C" as my answer to this question. The costs incident to the raising of the said crops of 1861 and 1862 were very great, and especially in the year 1862; the cost of supplies had run up to fabulous prices, and had to be purchased on time, or with money advanced by our commission-merchants, or with borrowed money, all of which was paid by me, after the death of Col. Acklin, out of the proceeds of said cotton.

Question 15. Was there any privilege, lien, or mortgage given by you or your husband upon the crops of these years, for the debt incurred or money raised to meet the outlay for those farms in the subsistance and clothing of the slaves and subsistance of the live stock as aforesaid? If so, please explain the nature and character of the same, the amount secured, and by whom, when, and how the debt was finally paid.

Ans. 15. There was a mortgage given in the name of Col. Acklin and myself upon the Louisiana plantation and a part of the slaves, and a privilege-lien upon the crops, to secure a very large debt and further advances, to Bradley Wilson & Co., of the city of New Orleans, Louisiana, and afterwards Col. Acklin gave a privilege-lien upon the crops for be-

tween thirty and forty thousand dollars more, all of which I paid out of the proceeds of said cotton on the 20th of May, 1864, to Bradley Wilson & Co., amounting to $278,594.86, including interest.

After I succeeded in getting said cotton to the city of New Orleans and ready for market, the said Bradley Wilson & Co. notified me of their
24 lien upon said cotton, (which was for a larger sum than I supposed,) and that I could not remove said cotton until their said debts and interest were paid, but that I might sell on condition their said debts were paid out of the proceeds. I therefore sold cotton and paid the debts and interest. I do not remember of giving my assent to said mortgage, or having given a power of attorney to any one authorizing the use of my name in the execution of said mortgage, though I may have given a power of attorney authorizing the use of my name, or authorizing the execution of the mortgage. I know that I and my children were at our residence near Nashville, and that Col. Acklin came to Tennessee, bringing with him notes bearing date in the city of New Orleans, La., for me to sign, amounting in the aggregate to a very large amount, stating, in substance, that Bradley Wilson & Co. refused to make any further advances for supplies for said plantation unless said notes were signed, to cover the debt and interest then said to be due to Bradley Wilson & Co., which had been running for some time, and to cover the advances supposed necessary to make the crop that year, and that the crop could not be made that year without said advances. This was the first year of the war, in the spring of 1861. But she was informed that, the exigencies of the war and the navigation of the Upper Mississippi being cut off, the supplies before the end of the year ran up to fabulous prices, when they could be bought at any price, and therefore Col. Acklin was compelled to give a privilege-lien upon the crops for further advances, as before stated, before the year closed. But it is true, as before stated, as she is informed and believes, that a mortgage was given by Col. Acklin and by Mr. Nelson, in her name, as her attorney in fact, upon said plantations, or a part of them, and a number of slaves, and upon
25 the crops. And it may be true that she signed a power of attorney authorizing Mr. Nelson to sign her name with her said husband in the execution of said mortgage. If she did so she has forgotten that part of the transaction. But her belief is that Mr. Nelson would not have used her name in the execution of said mortgage without a power of attorney from her, or what he believed to be authority from her.

Question 16. Was any deduction allowed by the U. S. assessor for the subsistence and clothing of said slaves, or the subsistence of said live stock, out of the proceeds of the crops of 1861 and 1862, raised and sold as aforesaid? If so, state the amount thus allowed.

Answer. The assessor refused, as I now remember, to make any deduction for the subsistence of the slaves and live stock upon said plantations for the year 1864, and he refused to allow any deduction out of the proceeds of said cotton for the subsistence and clothing of said slaves, and the subsistence of the live stock, upon said plantations for the years 1861 and 1862.

Question 17. Were you or Col. Acklin at any, and what, expense for the subsistence and clothing of said slaves, and subsistence of said live stock, on said plantations for the years 1863 and 1864. If so, was any, and what, allowance or deduction made in said assessment, made as aforesaid for the same?

Answer. Col. Acklin and myself incurred a very heavy expense for the subsistence and clothing of said slaves, and subsistence of the live

stock upon said plantations, in the years 1863 and 1864, but said assessor refused to allow any deductions for the same out of the proceeds of said cotton, as I now remember. In the years 1863 and 1864
26 the late war was then pending; no crops of cotton of consequence or of anything else was raised upon said plantations. The number of slaves upon the plantations, when the war began, was about 1,500. In 1863 and 1864 the slave-labor could not be controlled. In fact many of the able-bodied slaves, especially of the males, had left the plantations in one way and another, but the aged and infirm of both sexes, and the women and children, remained upon the plantations, and all had to be fed and clothed and have medical attention, and the stock had to be kept and subsisted. I am not able now to state said expenses for said years. Also many of said slaves had to be subsisted in the years 1864 & 1865, all of which I paid out of the proceeds of said cotton.

Question 18. Was any allowance or deduction made in the assessment for the necessary expenses in raising the crops of 1861 and 1862, and of storing and preserving the same up to the time of sale, or for average or other repairs of the plantations on which the crops were raised for the years 1861 and 1862, or for taxes paid for these years?

Answer. No allowance or deduction was made by said assessor for the necessary expenses of raising the crops of 1861 and 1862, or for taxes, or for storing and preserving the same up to the time of sale, or for average or other repairs of the plantations on which said crops were raised for the years 1861 & 1862, or for any year except the year 1864. For the year 1864, in which said cotton was sold, my recollection is that $10,000.00 was deducted from the proceeds of said cotton, supposing that said sum of $10,000 would be the average annual repairs for said plantations; that is to say, the assessor assumed that $10,000
27 would be the average repair each year upon said plantations, and he deducted the same for the year 1864 from the proceeds of said cotton.

Question 19. Did the assessor allow any of the objections made by you and Dr. Cheatham, and subsequently embodied in the written protest exhibited with your deposition?

Answer. Said assessor did not allow any of the objections made by me and husband, Dr. Cheatham, which were subsequently embodied in said written protest, marked "Exhibit D," to my deposition.

Question 20. Did the defendant, as tax-collector, allow you any of said objections, or did he proceed to collect the whole of the assessment?

Answer. The defendant, Norvell, as collector of internal revenue and taxes for said district, did not allow any of said objections, but he proceeded to collect the whole of said assessment, and more too. And deponent begs leave to add that said cotton was removed from said plantations in time of war; in rear of said plantations the confederate cavalry held the country, and the United States forces occupied the river; said cotton was removed under much danger and at very great cost, at war prices; and she is certain that many items of expenses have been omitted. She omitted to state at the proper place that she not only had an undivided interest in the plantations upon which said cotton was raised, but also an interest in the slaves and stock, &c. But as I have always been informed that by the laws of the State of Louisiana the husband is the head and master of the community, and can manage and control and dispose of the acquits and gains and products as he may choose, and that said cotton belonged to Col. Acklin, and on his death, after
28 the payment of his and the community debts, one half of the net pr

ceeds of said cotton passed to this deponent, and the other half to Col. Acklin's children; and your deponent was and is informed and believes that said portion passing to her on the death of Col. Acklin was not subject to any tax or duty; but this is a legal question, and she may be in error.

ADELECIA CHEATHAM.

Sworn to & subscribed before me Nov. 15, 1872.
E. R. CAMPBELL, *Clerk.*

Exhibit A to deposition of Adelecia Cheatham.

To the honorable the judge of the seventh judicial district court of the State of Louisiana, holding sessions in and for the parish of West Feliciana:

The petition of Joseph A. S. Acklen, at present residing in said parish, respectfully represents that he is a citizen of the State of Alabama, but for the last three years a citizen and resident of Louisiana, except for a few months during the summer, now, under the provisions of the laws of this State, claims to have his citizenship made a matter of public record. Therefore he prays your honor that this his declaration of domicil be received and made a matter of public record according to law and that your petitioner have all other relief that the nature of his case demands.

JOSEPH A. S. ACKLEN.

Having considered the foregoing petition, it is ordered that the same be received and filed according to law.
April 6, 1852.

CHARLES B. COLLINS, *Clerk.*

Filed April 6, 1862.

CHARLES B. COLLINS, *Clerk.*

STATE OF LOUISIANA,
Parish of West Feliciana:

SEVENTH JUDICIAL DISTRICT COURT,
CLERK'S OFFICE.

29 I certify the foregoing to be a true copy of the original now of record and on file in my office.

Given under my official signature and seal this 29 day of March, A. D. 1853.

[SEAL.] CHARLES B. COLLINS,
Clerk of said Court.

UNITED STATES OF AMERICA,
State of Louisiana:

By Paul O. Hebert, governor of the State of Louisiana.

These are to certify that Charles B. Collins, whose name is subscribed to the instrument of writing herein annexed is, and was at the time of subscribing his name to said instrument, clerk of the district court for the seventh judicial district of the State of Louisiana, in and for the

parish of West Feliciana, and that his attestation to the same is made in due form of law and by the proper officer.

SEAL OF THE STATE OF LA. Given at Baton Rouge, under my hand and seal of the State, this 5th day of April, A. D. 1853, and of the Independence of the United States the 77th.

By the governor:

P. O. HEBERT.

ANDREW S. HERRON,
Secretary of State.

Exhibit B to deposition of Adelecia Cheatham.

Declaration of domicil by Mrs. Adelecia Franklin.

To the honorable the judge of the district court and for the seventh judicial district, parish of West Feliciana, State of Louisiana, having the powers of and authority of the late judge of said parish of West Feliciana in matters of domicil.

The petition of Adelecia Hays, the widow and relict of Isaac Franklin, deceased, respectfully shews that your petitioner, by the death of her two daughters, Victoria and Adelecia Franklin, has inherited a
30 considerable estate in lands, slaves, and movable property situated in said parish of West Feliciana, and remaining in kind, undivided, with the property of the succession of her late husband, Isaac Franklin, to be administered by the executors of the last will and testament of her said husband, and divided when the ameliorations to said succession and the payment of the specific legacies therein mentioned *and* made; that the petitioner has good reason to believe that those ameliorations and payments will be completed and paid within two years, and that a division of the aforesaid property will be made so that your petitioner will receive and administer the aforesaid property which she inherited from her said children; that she is desirous of acquiring a residence in said parish, and in conformity with law declares her age to be twenty-eight; that she is a native of the State of Tennessee, and a gentlewoman, and designs to follow the pursuits of a planter on her said estates. She therefore prays that this notice be received and recorded in the office of recorder of mortgages in conformity with law.

ADELECIA FRANKLIN.

Let the prayer of this petition be granted.

WM. D. BOYLE,
Judge of the Seventh Judicial District.

MAY 22, 1847.
Truly recorded, May 22, 1847.

STATE OF LOUISIANA,
Parish of West Feliciana:

I certify the foregoing to be a true and correct copy of the record of the act of declarations of domicil' of Mrs. Adelecia Franklin, as taken from notarial record-book I, page 370, in my office, having first made diligent search for the original of said act and not finding the same on file in my office.

31 Given under my signature and seal official this 31 day of March, 1853.

[SEAL.] B. HARALSON, *Recorder.*

UNITED STATES OF AMERICA,
State of Louisiana:

By Paul O. Hebert, governor of the State of Louisiana.

These are to certify that B. Haralson, whose name is subscribed to the instrument of writing herein annexed, is, and was at the time of subscribing his name to said instrument, recorder in and for the parish of West Feliciana, State aforesaid, and that his attestation to the same is made in due form of law and by the proper officer.

Given at Baton Rouge under my hand and the seal of the State this 5th day April, A. D. 1853, and of the Independence of the United States the 77th.

[SEAL OF THE STATE.] P. O. HEBERT.

By the governor:

ANDREW S. HERRON,
Secretary of State.

Exhibit C to deposition of Adelecia Cheatham.

EXHIBIT C.

To the Hon'l :

Your petitioner, Adelicia Acklin, a citizen Daividson County, Tennessee, would respectfully state that before and during the years 1861 and 1862, and afterwards, up to the day of , 1864, her late husband Joseph A. S. Acklen, and your petitioner as his wife, were resident citizens of the State of Louisiana, in the parish of West Feliciana. At the later date the said Joseph A. S. Acklen departed this life, and your petitioner subsequently made her home in Tennessee. Your petitioner was and still is the owner of an undivided interest in several valuable plantations in the said State of Louisiana, the
32 other undivided interest belonging to her four children by said Acklen, for whom she is tutrix under appointment in that State. The plantations were carried on, however, under the management and control of her late husband, and he was entitled to an undivided half of the income, acquits, and gains. At the commencement of the year 1861 the said plantations were in a flourishing condition, and were during that year worked with reasonable diligence in the production of the great staple crop of cotton, and the yield was something like a fair average. But the difficulty of furnishing subsistence, clothing, and other necessary supplies for the fifteen hundred negroes then on the plantations increased as the year advanced, and the expenses were enormously enhanced before the close of the year. The occupation of the upper Mississippi River by the United States troops in the fall of 1861 cut off the usual supplies, and the ordinary necessaries of life ran up to fabulous prices. As early as September meat was worth $30 a barrel in coin, and subsequently went up to $50 and upwards. Under these circumstances, your petitioner and her husband were compelled to contract, and did contract for loans of money with their commission merchants at New Orleans, at eight per cent. per annum interest, secured by a privilege or mortgage on the plantations, slaves, and growing crop, which funds were absolutely necessary for keeping up the plantations, and were so applied.

Your petitioner now has before her a letter from Bradley, Wilson &

Co., of New Orleans, her commission merchants, written in the fall of 1861, which shows that the liabilities they had thus incurred for your petitioner and her husband by advances in 1861, and acceptances maturing in that year and in 1862, up to July, amounted to $231,373.91.

33 And this debt, with 8 % interest, was subsequently, in 1864, paid to them or their assigne's out of the proceeds of the sale of the crop of 1861, the whole sum thus paid being $278,594.86.

Your petitioner would further state that the increased difficulties of obtaining supplies, the absolute necessity of raising provisions, and the impossibility of regulating and controlling the labor of the slaves, largely diminished both the planting and yield of cotton in the year 1862. Your petitioner is fully satisfied that the yield of the cotton crop of 1862 was not the one-third of the yield of 1861, and the expenses of carrying on the plantations were greater. Your petitioner's husband was compelled to make, and did make, great sacrifices to enable him to go through the season. The cotton crop of 1861 had been ginned and baled, but the crop of 1862, on account of the running off the stock, and the impossibility of procuring bagging and rope, remained in the seed, until, in the summer of 1864, sacks were procured and brought up from New Orleans, and the cotton at great expense and hazard taken to New Orleans and there ginned and baled. Your petitioner is thus particular in stating these facts, in order that it may be clearly seen that her agent in the estimate hereinafter mentioned of the net proceeds of the crop of 1862 was fully justified by the facts, and that he erred, in reality, in making the amount larger than it should have been.

Your petitioner supposed that these crops, having been the produce of plantations in Louisiana, where she and her husband were at the time domiciled, and in which her husband, herself, and her children had an undivided interest, that she was not expected to make return thereof under the internal-revenue laws of the United States, unless required to do so by the local assessors of that State, where the facts were known and could easily be established. She was also ad-

34 vised that no effort was being made to collect the income-tax for the years 1862, '3, and '4, in the State of Louisiana, and that it was neither right nor just to make *to make* an exception of her case to the general rule. Accordingly she did not make any return of the proceeds of the crop of 1862 in her return of income in Tennessee. Recently, however, a special agent of the Treasury Department at Washington applied to petitioner's agent for a return of the sales of said crop. Said agent of the Treasury Department stated that the act of Congress of , 1862, did not, nor did any of the subsequent acts in relation to the tax on incomes, reach back to the crop of 1861, and that what your petitioner was required to do was to return her income in the crop of 1862.

Your petitioner was advised by counsel that the act of Congress of 1864, under which she was required to make the return, does not cover or include the proceeds of crops made previous to the year 1864, and that this point had been expressly decided by the courts of the United States, among others by the circuit court of the United States at Baltimore, in the case of Odler Bove. But said Treasury agent threatening, notwithstanding his attention was called to the legal construction of the law, that he would himself cause a return, with the penalties prescribed, to be made, unless your petitioner would furnish a return herself, your petitioners' agent applied to him to know whether it would be necessary to make out all the items specifically or only to make a lumping statement. Upon his assurance that the latter would be sufficient, your

petitioners' agent, by taking one-half of the net sales at New Orleans and Liverpool, as they appeared on the accounts before him, added 25% for the difference between gold and currency to the sales in Liverpool, and by deducting one-half of such allowance as he thought your petitioner would be entitled to, ascertained that the full amount with which your petitioner could be chargeable in any event for the crop of 1862
35 was $103,195, and made return accordingly, accompanied, however, with a protest in your petitioners' name against any assessment of income tax upon said crop. The Treasury agent accepted the return, and promised, as your petitioners' agent understood him, to lay the return and protest before the Commissioner at Washington.

Your petitioner was therefore taken by surprise when served, on or about the 15th of May inst., with a notice in writing by H. L. Norvell, collector of the 5th dist., Tennessee, that a tax had been assessed upon her amounting to ninety-nine thousand seven hundred and twenty-six dollars, ($99,726,) on her income for the year 1864, and that payment thereof was demanded. Your petitioner does not know how this result has been arrived at, but she knows that the amount is excessive, and she solemnly protests against the same, not only for the reasons suggested in her protest above referred to, but because the same is erroneous and unjust. Your petitioner has, as rapidly as possible, obtained the necessary papers from New Orleans and elsewhere, and is now able to make a correct statement of the exact amount realized from the sales of said crops, and an approximation of the deductings to which, as she is advised, she is entitled to under the internal-revenue laws.

Your petitioner would now state that the crops of cotton of 1861 and 1862 were with great difficulty and at great expense preserved from distruction until the spring of 1864, when they were sent together, the crop of 1861 ginned and baled and the crop of 1862 unginned and in sacks, to New Orleans, where the latter crop was ginned and baled. The entire crops amounted to twenty-eight hundred and eighty-seven bales, (2,887,) of which, as she is informed and believes, over two thousand were of the crop of 1861, and the residue of the crop of 1862. Of these, seventeen hundred and eighty-five bales (1,785) were sold at New Orleans, and eleven hundred and two bales were sent by way of New York
36 to Liverpool; the cost of shipment being paid out of the proceeds of sales at New Orleans. After paying the necessary expenses of getting the crops to market, and the expenses of the sales at New Orleans, and the Government dues, including—

Internal-revenue tax	$49,197 40
Excise tax	24,598 70
Hospital fees	14,116 80
	$87,912 90

the net balance of the sales at New Orleans, as shown by the account-sales and accounts-current of the commission merchants, (all of which can be produced, if required,) amounting to the sum of three hundred and twenty thousand seven hundred and thirteen $\frac{71}{100}$ dollars. In the same way, the net sales of the cotton made at Liverpool, between July and Decr., 1864, as shown by the accounts-currents of Schroder & Co., (which can be produced, if required,) were fifty-one thousand four hundred and thirty-nine pounds two shillings and six pence, (£51,439 2 6,) which when reduced to Federal denominations at four $\frac{84}{100}$ dolls. to the pound sterling, amounts to two hundred and forty-eight thousand nine

hundred and sixty-five dollars and thirty-six cents, ($248,965.36.) The proceeds of these sales were placed to her credit at the Rothschild in Sept. and Decr., 1864, and Jan'y, 1865. The net sales at New Orleans and Liverpool are $569,679.07.

Your petitioner is advised that, upon the supposition that these net proceeds are liable to an income-tax, she is entitled to have deducted therefrom the necessary expenses of raising the crops, the average repairs on the plantations for the years 1861 and 1862, the annual taxes for those years actually paid, the interest upon the mortgage debt on the plantations and crops, and the actual expenses of preserving the cotton from destruction.

She is also advised that, if the proceeds of either of these crops are to be charged as income for 1864, she is entitled to a further de-
37 duction for the interest of the mortgage debt to the day of payment, and for the subsistance of the slaves and stock to 1864, inclusive. All these credits she has set forth in the schedule or exhibit herewith filed, marked "No. 1," and made a part of this petition. The items are estimated from the best information she has been able to procure, and are, she believes, a near approximation to the truth, and under rather than over the reality. They amount, it will be noticed, to three hundred and seventy-nine thousand eight hundred dollars. If now we deduct this amount from the next proceeds of sales as above, we have a balance of one hundred and eighty-nine thousand eight hundred and seventy-nine $\frac{07}{100}$ dollars. Of this balance, for the reasons already given, two-thirds may be considered as the net proceeds of the crop of 1861, and one-third as the net proceeds of the crop of 1862; thus:

Two-thirds for 1861	$126,586 05
One-third for 1862	63,293 02

Your petitioner believes the foregoing is a near approximation to the truth, and if she is chargeable with any thing, it is only with the income-tax on her undivided interest in the net proceeds of the crop of 1862, and then only under the provisions of the act of Congress of 1862, not the act of 1864, which cannot relate back to crops raised before that year. The crop of 1871, it is obvious, is not subject to income-tax at all, and the net proceeds of its sales were used in the payment of the debt which was a mortgage thereon. Your petitioner submits that she ought not to be charged at all except through the local assessors of the State of Louisiana, and then, only in case all other citizens in like situation with her husband and herself in that State are so charged with income-tax on the crops of these years. She respectfully asks that the assessment made by the local assessor of the 5th collection-dist.
38 of Tenn. be reviewed, set aside, and annulled; that her protest against any assessment be considered and acted on, and that justice be done in the premises. It is proper to add that one of the deductions made by her is the amount of $50,000, claimed by Alex. Walker, for services in getting the crops to market, and for the recovery of which he has brought suit in the courts of Louisiana, and recovered judgment for $25,000, which judgment was, upon appeal to the supreme court, reversed and remanded for another trial. If this claim should be disallowed in whole or in part, and your petitioner is held bound to pay an income-tax on the crops in question, she will, hereafter, in future returns of income, hold herself bound to return so much of the $50,000 as may be avoided in said suit, less the actual expenses incurred in defending the same. This is the only deduction made from the gross sales

at New Orleans, as per account-sales and account-currents, which is not for money actually paid by her said commission merchants at New Orleans for the necessary expenses of getting the crop to market and selling the same. The deductions in schedule A, No. 1, are in addition, and such as she is advised she is entitled to under the internal-revenue laws. Your petitioner has exhausted the proceeds of the crop of 1861 in the payment of the mortgage debts as before stated, and if now called upon to pay an income-tax on the proceeds of that crop, would be compelled to sell property to meet the demand. Your petitioner again submits the matter to your decision, being willing, as she always has been, to pay an' dues with which she is legally and properly chargeable.

Exhibit schedule No. 1 *to foregoing petition.*

39

1864.			
April 26.	To net sales 1,118 bales cotton at N. O		$299,758 56
June 8.	" " " 642 " " " " "		190,565 58
" 27.	" " " 25 " " " " "		12,359 16
" 8.	" sacks returned, $5,583.25, overcharge on insurance $1,442.50		7,025 75
July to Decr.	" net sales 1,102 b. c. at Liverpool, £51,439 2 6 at 4.84		248,965 36
			$758,674 41
1864.			
April & May.	By bagging, rope, sacks, & freight thereon	$7,769 05	
" to June.	" waggons, teams, & freights thereon	8,843 46	
" " "	" river freights on cotton	2,615 00	
" " "	" permits to ship, bagging, &c	550 00	
" " "	" *by* amt. paid Dufield for bringing out cotton	10,597 94	
" " "	" amt. paid Alex. Walker " " "	500 00	
" " "	" " W. H. Hunt, prof. services	5,000 00	
June 6.	charges on 500 b. c. shipped to Liverpool	32,150 66	
" 21 to 30.	" " 602 " " " " "	43,969 23	
	By subsistence, clothing, medical attendance, and supplies for 1,500 negroes; subsistence for 700 mules, horses, and cattle, and other expenses, 1861 & 1862	200,000 00	
	By " " " " " 1863 & 1864	100,000 00	
	" 6 overseers for 1861 & 1862	12,000 00	
	" average repairs " " "	7,000 00	
	" taxes " " "	4,800 00	
	" interest on mortgage debt for 1861 & 1862, on farm & crops @ 8 %	32,000 00	
	" do. do. do. do. 1863 & 1864	24,000 00	
	" actual expenses in saving cotton '62 to '64	25,000 00	
	" amt. claimed by Alex. Walker & in suit	50,000 00	
			$541,795 34
			$216,879 07
	Net amt. sales in New Orleans	$507,709 05	
	Less actual expenses	111,995 34	
			$397,713 71
	Net sales in England		248,965 36
			$646,679 07

40

	Brt. forward	$646,679 07
	Expenses of producing, saving, and taking to market	429,800 00
		$216,879 07
	Of this ⅔ is a fair estimate for crop 1861	$144,586 05
	And ⅓ " " " " 1862	72,292 02
		$216,899 07

Exhibit D to deposition of Adelecia Cheatham.

William A. Cheatham and Adelecia, his wife, lately Adelecia Acklen, protest against the assessment of the income-tax made out against the said Adelecia by the local assessor of the 5th collection-district of Tennessee, at Nashville, for the year 1864, and under the act of Congress of the 30th day of June, 1864, chapter 173, sections 116 to 123, and returned to the collector of said district for collection thereof, and assign the following, among other reasons, for protest:

1st. More than one-half of the said assessment is based upon the proceeds of the sales of cotton, the crop of the year 1861, before there was any law of Congress laying a tax upon income.

2d. The residue of said assessment is based upon the proceeds of the sales of cotton, the crop of 1862, which crop was not liable to assessment at all under the act of 1864, as aforesaid.

3rd. The tax was assessed at ten per cent. on the income as ascertained by the assessor, when the only law under which such assessment could be made, if legal at all, was the act of Congress of the 1st day of July, 1862, sec. 89, which fixes the rate at 3 % on incomes under $10,000 and 5 % on incomes over $10,000.

41 4th. The act of 30 June, 1864, has been repealed by the act of Congress of the 3rd day of March, 1865, and was not in force when said assessment was made.

5th. The act of 30th day of June, 1864, if it was in force, does not cover or include the proceeds of crops made previous to the year 1864.

6th. The assessor refused to make any deduction for the subsistence of the slaves and stock for the year 1864.

7th. The assessor refused to make any allowance for the necessary expenses of raising the crops of 1861 and 1862, and which expenses amounted up to July, 1862, to the sum of $271,373.91, to secure which, at the time the debt was incurred, a privilege or mortgage was given by the said Adelicia and her husband, Jos. A. S. Acklen, upon the crops of 1861 and 1862 and upon the plantations on which the crops were raised.

8th. The assessor refused to allow all the costs and expenses necessarily incurred in preserving the said crops and getting the same to market.

9th. The assessor made no allowance for the average repairs upon said plantations for the years 1861 and 1862.

10th. The cotton upon which said assessment was made was raised in the parish of West Feliciana, State of Louisiana, in which parish the said Jos. A. S. Acklen and the said Adelecia, his wife, now Adelecia Cheatham, were resident citizens in the years 1861, 1862, 1863, and 1864, and up to the day of , 186 , after the death of the said Jos. A. S. Acklen, which occurred on the day of , 186 , and the cotton never was brought to Tennessee, and ought to be assessed, if assessed at all, by the local assessors of the parish of West Feliciana, State of Louisiana.

11th. The assessor should also be made, not against the said Adelecia, but against the personal representatives of the estate of Jos. A. S. Acklen.

42 12th. The assessment of the income-tax for the years 1862, 1863, and 1864, had been suspended by law in the State of Louisiana, and there is no reason why the suspension should not operate upon the crops in question, nor why the said Adelecia should be made an exception to a general law.

13th. The assessment in question is, therefore, for the reasons assigned

under the three last heads, made by persons not authorized to make the same, against the wrong person, and is illegal and void.

14th. The interest of the said Adelecia in the plantations on which said cotton was raised was only an undivided interest of , and her share of the net proceeds or income derived from the sale thereof was only in the same proportion, and her husband, the said Jos. A. S. Acklen, was, by the laws of Louisiana, entitled to one-half thereof as his share in the community acquits and gains.

15th. The assessor refused to allow the interest on the privilege or mortgage debt, except for the year 1864.

16th. Other good causes.

The payment of said income-tax upon the assessment as aforesaid is made under this protest, and notice is hereby given that the said Cheatham and wife will bring their action to recover the amount so paid, or so much thereof as may have been illegally and wrongfully assessed and collected.

W. A. CHEATHAM, *for Self and Wife.*

Second. The plaintiffs next read the letter of Thomas Harland, deputy commissioner of United States internal revenue, at Washington, to John McClelland, assessor of internal revenue of the United States for
43 the 5th collection-district of the State of Tennessee, at Nashville, Said letter of date Oct. 7, 1867, being dated from the office of the Treasury Department of internal revenue, at Washington with instructions therein to said John McClelland, assessor, which is marked "No. 2" and made a part of this bill of exceptions.

Letter of Thomas Harland, marked "No. 2."

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington Oct. 7th, 1867.

SIR: I have before me your letter of 9th ult., relative to the assessment made upon the income of Mrs. Adelecia Acklen, of Nashville, for the year 1864; also, letter of 13th of May last of D. S. Goodloe, esq., rev. agent, enclosing abstract of the assessment, and a petition from Mrs. Acklen, addressed to this Office; also, a letter dated Aug't 24th last, from Collector Norvell, introducing to the Office Mr. Thomas T. Smiley, of your city; also, a copy of the account-current for 1864, between W. A. Johnson & Co., of New Orleans, commission merchants, and Mrs. Acklen; also, the account-current between Mrs. Acklen and J. H. Schroder & Co., of Liverpool, for the same year and various other papers.

It appears that, being unable for some reason to obtain a statement from Mrs. Acklen of her income for 1864, an independent assessment was made by you, based upon the sales of 3,000 bales of cotton in 1864, for $800,000 net, and tax assessed, which, with penalty, amounted to $99,650. The reasons which prevented due returns by Mrs. Acklen for the year 1864 are stated by Mrs. A. in her petition, many of which, if not all, are deserving of consideration, but whether valid or not,
44 there is no doubt but that, under the circumstances, you were justified in making an independent assessment, while, at the same time, in view of the statements of the petition, and the accounts of Mrs. Acklen with her agents in New Orleans and Liverpool, it is clear that the assessment made is so far in excess of the proper assessment that great injustice should be done were it allowed to stand.

On examination of the accounts-current referred to you, you will see that

in all 2,887 bales of cotton, the product of various plantations in the State of Louisiana in the years 1861 and 1862, were sold in 1864; of which 1,785 bales were sold in New Orleans for $501,235.00, and 1,102 bales in Liverpool, for £51,439 2 9 reduced to Federal denominations at $4.84 per pound sterling, $248,965. Mrs Acklen appears to have gotten the impression that at least so much of the proceeds of the aforesaid crops as was raised for the product of the year 1861 is not returnable as income; but the law now in force, and also at the time of assessment of income for 1864, places the tax on all sales of farm and plantation products made in that year, making no distinction as to the time when the same were raised. Such expense of carrying on the farm or plantations as is due to the year of income (in this case in 1864) is also deductible from the sales, but expenses due to former years cannot be taken into consideration.

In the abstract of the independent assessment, which you forward, you have allowed "$400,000 expenses of taxing and raising;" but there is no authority for such allowance, at all events, in making a regular assessment.

45 In view of the above-mentioned requirements of the law, and the unprecedented expense incurred in raising the crops sold in 1864, it is believed to be no more than just that Mrs. Acklen should enjoy the extreme benefit of all such other deductions as can be legally and reasonably made. The Office will therefore consider the facts of the case in detail. The first consideration to which the petitioner calls attention is, "that before and during the years 1861 and 1862, and afterwards, up to the 11th day of September, 1863, her late husband, Joseph A. S. Acklen, and your petitioner as his wife, were resident citizens of the State of Louisiana in the parish of West Feliciana."

"At this latter date the said Joseph A. S. Acklen departed this life, and your petitioner subsequently made her home in Tennessee. Your petitioner was and still is the owner of an undivided interest in several valuable plantations in said State of Louisiana, the other undivided interest belonging to her four children by said Acklen, for whom she is tutrix, under appointment in that State. The plantations were carried on, however, under the management and control of her late husband, and he was entitled to an undivided half of the income, acquits, and gains."

From the above statement, and the terms of the Louisiana code, it appears that an undivided half of the cotton product, the sale of which in 1864 forms the basis of said assessment, passed in September, 1863, as personal property, from Joseph A. S. Acklen, to his children, constituting legacy only, and not taxable as income.

46 If any profit were realized by the sale of said cotton over and above the value, when the same passed to the children of Mrs. & Mrs. Acklen, which is doubtful, that profit would be returnable as income of the beneficiaries. As tutrix of her children, it appears Mrs. Acklen undertook the transportation and sale of all the cotton referred to, including her own. Under these circumstances, it is of course unnecessary to follow the disposition of that portion of the cotton belonging of right to the children, but, for convenience sake, the entire sales and expenses will be first considered.

I now quote from the petition a statement which leads at once to certain profits realized by the sales at New Orleans, and which appears to be bourne out by the Johnson account-current, "after paying the necessary expenses of getting the crops to market, and the expenses of the sales at New Orleans, and Government dues, including—

Internal-revenue tax..... $49,197 40

Excise tax 24,598 70
Hospital fees..... 14,116 80

the net balance of the sales at New Orleans, as shown by the account-sales and accounts-currents of the commission merchants, amounted to $320,713.71."

It is previously stated that the costs of shipment to Liverpool were paid out of the proceeds of sales at New Orleans, and by reference to the Johnson account, it will appear that the bill of charges for shipment, insurance, &c., of 500 bales to Liverpool was $32,150, and of 602 bales $40,655, which sums, added to the taxes above mentioned, make an aggregate of $160,716. This sum, deducted from the $501,235, leaves $341,519. Now, if the $320,713 above be deducted from $541,519, there is left $20,806, to cover Mr. Johnson's charges on sales and expenses of transportation to New Orleans. Mr. Smiley alleges that the
47 person who drew the petition has in some way here made a gross mistake, as he is firm in the conviction that Mr. Johnson's charges on sales above exceeded $30,000, and refers to the Johnson account to show that not only the legitimate expenses of transportation to New Orleans were excessively large, but the expenses of counsel, paid in connection with an arrest of the cotton "in transitu," were also very considerable. All these expenses incident to the transportation to New Orleans are allowable deductions, and you are requested to confer with Mr. Smiley, with a view to arrive at an amount which, while protecting the interests of the Government, will fully cover such expenses, so that no reasonable ground of complaint on this score can exist. In addition to the charges covering fees of counsel, as shown in the Johnson account, and already paid, is an amount of a judgment recovered against the petitioner for $25,000, by Alexander Walker, for services in getting said crops to market, but which judgment was reversed on appeal, and the case remanded.

Under the circumstances, Mrs. Acklen wishes to be allowed to deduct the $25,000, holding herself bound to return as future income so much thereof as may be avoided in the suit; but the Office thinks she is not entitled to this deduction, but will be entitled to deduct any actual portion thereof hereafter paid from future returns of income, or make claim for tax paid on amount thereof.

So much interest money as was paid by Mrs. Acklen on mortgage debt, and as was due to the year 1864, is also deductible. The debt and interest at 8 per cent., when paid about Dec., 1864, as appears,
8 was $278,594, the interest due to the year 1864, appears to be about $16,880. The amount paid for average repairs of the various plantations and the expense of carrying on the same in 1864, are also among the deductions which the law allows.

Mrs. Acklen is also entitled to deductions of State and county taxes paid in 1864, as well as the national taxes above stated.

Finally, the expense of ginning and baling the cotton, not being an expense incurred in the production thereof, but rather in preparing the same for market, and part of which, in fact, was accomplished at the city of New Orleans, after transportation, is a subject of deduction. As the major part of this expense was incurred before Johnson & Co. had any connection with the business of Mr. Acklen, and was evidently paid out of the advancements made to Mrs. Acklen by Wilson & Co., the amount will not be found in the Johnson account, and in estimating the aggregate, you will be obliged to rely upon other sources of information.

Mr. Smiley has several letters from persons (some of whom are known to the Office) who have had experience in such matters, which he will

lay before you, by the aid of which, together with the accounts kept by Mr. Acklen, if any, and your own experience and knowledge, you can arrive at the probable expenses.

The $248,965 sales at Liverpool, as you will see from the Schroeder account, represent the net profit after deduction of the charges incurred in England. This was in gold; but, unless the same was sold, there is no premium to be returned. If sold, the premium is returnable as income of the year of sale, adding the sales of Liverpool,
49 ($248,965,) and the sales of New Orleans, (501,236,) the aggregate is found to be $750,200.

You will estimate the aggregate of deductions allowed, and subtract the same from the $750,200, one-half of the remainder will represent the taxable income of Mrs. Acklen, as derived from the sales which form the basis of assessment.

From a rough, and, in the nature of the case, imperfect, estimate made by the Office, it is thought the tax due will be found to amount to from $22,000 to $25,000.

You will please report the conclusion to which you arrive to this Office.

The Office takes the occasion to acknowledge its appreciation of your fidelity, and confidently hopes, with the aid of Mr. Smiley, (whose disposition to represent the interest of his clients fairly, and unaccompanied with any reflection whatever upon you or your associates, is thoroughly appreciated,) you will soon a satisfactory conclusion.

Respectfully,

THOMAS HARLAND,
Deputy Commissioner.

To JOHN MCCLELLAND,
Assessor, Nashville, Tennessee.

The following facts were agreed to and admitted to be true by the counsel for both parties:

That on the 10th day of May, 1867, John McClelland, of the fifth collection-district of the State of Tennessee, made an assessment against the plaintiff, Adelecia Cheatham, of $99,726.00 as income-tax for the year 1864, growing out of the sale of 2,887 bales of cotton; that the said Adelecia Cheatham, on the 17th day of June, 1867, by petition, ap-
50 pealed to the Commissioner of Internal Revenue of the United States against said assessment. On the 7 Oct., 1867, the Commissioner, through his deputy, instructed the assessor, John McClelland, to make a new assessment. That on the 15th day of March, 1868, a new or final assessment was made against the said plaintiff, Adelecia Cheatham, for income for the year 1864, as follows:

Net income for the year 1864	$301,919 18
Amount in excess of $600, and not exceeding $5,000, subject to 5%, $4,400.00	220 00
" " " " $5,000, subject to 10%, $297,519.18	29,751 91
Total tax and amount due	29,971 91

That on the day of , 1868, the plaintiff, Adelecia Cheatham, paid said $29,971.91 under protest in writing, and that on the 15 day of January, 1869, the plaintiff instituted this suit to recover said amount paid under protest.

The plaintiffs' counsel next read to the court and jury the receipts of the defendant, Norvell, showing the dates and amounts of the several payments of the said assessment marked "No. 3," and made a part of this bill of exceptions.

Statement of the payment of Mrs. Acklens income-tax by her husband, Dr. W. A. Cheatham.

April 30, 1868, by cash		3,799 00
July 25 " " "		20,000 00
Oct. 29 " " "		8,275 00
		32,074 00
Am't of tax	$30,049 00	
Penalty on $26,250	1,312 50	
Interest on $26,250 to 1 July	525 00	
" " $6,250 to 1 Oct	187 50	
		32,074 00

H. L. NORVELL, *Coll'r.*

51 The plaintiffs, by their counsel, submitted the five following propositions in writing to the court and requested the court to charge them to the jury as the law; which paper is marked "No. 4," and made a part of this bill of exceptions.

Paper marked "No. 4."

First. That in order to have the benefit of any statute of limitations, the defendant must plead the same, and there being no plea of the statute in this case, the defendant can set up no such defence.

Second. That the 19th section of the act of July 13, 1866, ch. 184, only imposes upon a tax-payer as a condition preliminary to bringing a suit for the recovery of taxes illegally assessed, and paid by him under protest, an appeal to the proper officer, and a decision thereon; that this appeal may be taken from the assessment, and, if so taken, and the new or re-assessment is made in strict conformity with the rulings on the appeal, then no second appeal is necessary to entitle the tax-payer, upon payment of the illegal assessment under protest, to sue for and recover the same.

Third. That in such cases the 19 section of the act of July 13, 1866, ch. 184, does not affix any limit of time within which the suit shall be brought, as a condition to the right of action, or as a statute of limitations.

Fourth. That if it did prescribe a limitation of time within which to sue, it would be a statute of limitations, and as such must be relied on by plea by the defendant if he wished to have the benefit of it.

Fifth. That the plaintiff in this case had no right of action against the defendant until the assessment was actually paid, and the action having been brought within six months from the payment under protest, the action is not barred by anything contained in the 19th section of the act of July 13, 1866.

52 The court allowed the first, third, and fourth propositions, and disallowed the second and fifth; to which the plaintiffs, by their attorneys, excepted at the time.

Charge of the court to the jury.

The court charged the jury as follows:

First. That, by the laws of the State of Louisiana, the crops of cotton of 1861 and 1862 were the property of Joseph A. S. Acklen, the late husband of the plaintiff, Adelecia, at the time of his death in 1863, and when *when* she sold said crops of cotton in 1864, as administratrix of her said late husband, after paying the community debts of her husband and self, and his individual debts, if he owed any such, one-half of the net balance of the proceeds of said cotton passed to the said plaintiff, Adelecia, by the laws of the State of Louisiana, and was not liable to any tax or duty in her hands under the act of Congress.

Second. That the crops of cotton raised in the years 1861 and 1862, respectively, were the annual products of those years, and could not be taxed as income for the year 1864, under the act of Congress of June 30, 1864.

Third. That it is the opinion of the court, and it so charges, that the assessment of said income against the plaintiff, Adelecia Cheatham, was erroneous and illegal, and made without the authority of law. Although the court is of the opinion that the assessment was illegal, yet it thinks, and so charges, that this case depends solely upon the construction of the 19th section of the act of 13th July, 1866.

The court is of the opinion that the said 19th section is not a statute of limitations, as has been suggested, but it is a right given by
53 Congress to all persons who feel that they have been illegally or erroneously assessed to sue to recover back money paid and exacted illegally; but only when they have complied with the provisions of said section of said act. It is a condition without doing which the parties have no action. When a person shall deem himself illegally or erroneously assessed, before he can maintain suit in any court, he must appeal to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and a decision of said Commissioner shall be had *months* thereon, and suit must be brought within six from the time of said decision, or within six months from the time this act takes effect. However, if said decision is delayed more than six months from the date of such appeal, the said suit may be brought at any time within twelve months from the date of such appeal.

Now, if the jury shall believe, from the evidence, that the decision made by the Commissioner of Internal Revenue was made within six months from the 17th day of June, 1867, when this appeal was taken, then, under the 19th section of the act of 13th July, 1866, the plaintiffs must have brought their suit within six months from the date of that decision, and unless they did so, they cannot maintain this suit, and the jury must find for the defendant.

To which rulings of the court the plaintiffs, by their attorneys, then and there excepted, and tendered to the court this their bill of exceptions; which was signed and sealed by the court, and ordered to be made a part of the record of said cause.

CONNALLY F. TRIGG, [SEAL.]
District Judge, Presiding.

54 UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had

in said court in the cause of William A. Cheatham and his wife, Adelecia Cheatham, plaintiffs, against Henry L. Norvell, collector, defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of our said court, at Nashville, this the 6th day of March, A. D. 1874, and the 98th year of the Independence of the United States.

[SEAL.] E. R. CAMPBELL, *Clerk*,
By J. W. CAMPBELL, *D. C.*

(Indorsement on cover:) No. 160. William A. Cheatham & Adilicia Cheatham, his wife, plaintiffs in error, vs. Henry L. Norvell, collector internal revenue. M. Tennessee, C. C. U. S. Filed 16th March, 1874.

Supreme Court of the United States.

Brief for the Appellants.

W. A. CHEATHAM AND WIFE,

vs.

HENRY L. NORVELL.

ASSIGNMENT OF ERRORS.

Supreme Court of the United States.

Brief for the Appellants.

W. A. CHEATHAM & WIFE,

vs.

HENRY L. NORVELL.

ASSIGNMENT OF ERRORS.

The appellants, Cheatham and wife, assign as errors the following clauses of the charge of the court below:

1. "The court is of the opinion that the said 19th section (of the act of the 13th of July, 1866,) is not a statute of limitations, but it is a right given by Congress to all persons who feel that they have been illegally or erroneously assessed, to sue to recover back money paid and exacted illegally; but only when they have complied with the provisions of said section of said act. It is a condition without doing which the parties have no action." Printed Record, p. 22.

2. "When a person shall deem himself illegally or erroneously assessed, before he can maintain suit in any court, he must appeal to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and a decision of said Commissioner shall be had thereon, and suit must be brought within six months from the time of said decision." Printed Record, p. 27.

3. "Now, if the jury shall believe from the evidence, that the decision made by the Commissioner of Internal Revenue was made within six months from the 17th day of June, 1867, when this appeal was taken, then, under the 19th section of the act of the 13th of July, 1866, the plaintiffs must have brought their suit within six months from the date of the decision, and unless they did so, they can not maintain this suit, and the jury must find for the defendant." Printed Record, p. 27.

Also the refusal of the court to give to the jury the following specific instructions asked for by the appellants:

4. "That in such cases (when an appeal is taken to the Commissioner of Internal Revenue, under the act of the 13th of July, 1866, from the assessment of taxes, and the re-assessment is made in strict conformity with the rulings on the appeal,) the 19th section of the act of the 13th July, 1866, chapter 184, does not affix any limit of time within which the suit shall be brought as a condition to the right of action, or as a statute of limitations." Printed Record, p. 26.

5. "That the plaintiffs in this case had no right of action against the defendant until the assessment was actually paid, and the action having been brought within six months from the payment under protest, the action is not barred by anything contained in the 19th section of the act of July 13th, 1866." Printed Record, p. 26.

STATEMENT OF THE CASE.

The plaintiffs, William A. Cheatham and Adelicia, his wife, intermarried on the 18th of June, 1867, she being then the widow of the late Joseph A. S. Acklen, who had died intestate on the 17th of September, 1863. Acklen and wife were, at the date of his death, and had been for many years before, resident citizens of the Parish of West Feliciana, in the State of Louisiana. He left four children him surviving, to wit: Joseph H. Acklen, William A. Acklen, Claude Acklen, and Pauline Acklen. The wife and children of Acklen were the owners in undivided proportions of large plantations in the said Parish of West Feliciana, which were managed by Joseph A. S. Acklen, as husband and father. On these plantations he had raised in the year 1861, a cotton crop of about (2,000) two thousand bales, and in the year 1862, another crop of about (887) eight hundred and eighty seven bales. These crops were only raised at great expense, the money being obtained from Bradley, Wilson & Co., a commission house at New Orleans, by a privilege mortgage on the plantations, slaves and growing crops, which amounted, when paid in 1864, out of the proceeds of sales of the crops, to $278,594.86. These crops were, in the spring of 1864, taken to New Orleans, and partly sold at that point, and partly shipped to and sold in England, the United States receiving out of the proceeds in internal revenue tax, excise tax, and hospital fees, $87,915.90. Printed Record, p. 18. These facts all appear from Mrs. Cheatham's deposition, and her petition to the Commissioner of Internal Revenue made an exhibit thereto, (Printed Record, pp. 7, 8 and 16,) and are not disputed.

These crops having been the products of the farms for the years 1861 and 1862, and, of course, previous to the year 1864, could not constitute any part of the income for the year 1864, nor come within the purview of the act of Congress of the 30th of June, 1864, chapter 173, under which the assessment complained of was made. Moreover, the act of the 30th of June, 1864, chapter 173, had been repealed by the act of the third of March, 1865, chapter 78, sections 1 and 16, before the

assessment in controversy was made. Besides, the crops having been raised by Joseph A. S. Acklen, constituted a part of the acquets and gains of the community property under the laws of the State of Louisiana, and a part of the estate of the husband at his death in 1863, and the proceeds of the crops, when sold by Mrs. Acklen, as his administratrix in 1864, were distributable, after paying the community debts, and the individual debts of the husband, between the widow and children, (Louisiana Code, section 2371, et seq.,) and subject to tax as such. It is clear, therefore, that the assessment was illegal and void, and this was conceded in the court below, both by the District Attorney for the United States, and by the learned Judge who presided, and he so charged the jury. (Printed Record, p. 27.) Gray *vs.* Darlington, 15 Wall., 63, 65.

By the agreed facts in the printed Record, page 25, it will be seen, that, on the 10th of May, 1867, John McClelland, assessor for the Fifth Collection District of the State of Tennessee, made an assessment against the plaintiffs, Cheatham and wife, of $99,726, *as income tax for the year* 1864, growing out of the sale of the said 2887 bales of cotton, raised in 1861 and 1862, and sold in 1864 as aforesaid. That the plaintiffs, by petition, on the 17th of June, 1867, appealed to the Commissioner of Internal Revenue against this assessment. That, on the 7th of October, 1867, the Commissioner instructed McClelland to make a new assessment upon the principles stated in his letter. (Printed Record, p. 22.) That, on the 15th of March, 1868, a new assessment was made against the plaintiff Adelicia, *for the year* 1864, upon the principles settled, in which her net income for 1864, arising from the sales of said cotton was estimated at $301,910.18, and she was assessed

On $4400, at 5 per cent.,	$220.00.	
And on the residue, $297,579.18, at 10 per cent..	29,751,91.	$29,751.91.

That this tax was, under the written protest on page 21 of the printed Record, paid by plaintiffs, together with interest and penalties, as follows :

1868, April 30, Paid in cash,	$3,799.	
" July 25 " "	20,000.	
" Oct. 29 " "	8,275.	$32,074.

(See printed Record, p. 26.)

On the 15th of January, 1869, (Record, p. 4,) this suit was commenced in the State Court, and afterward transferred, upon

petition of the defendant Norvell, to the United States Court. The declaration, filed January 26th, 1869, is in indebitatus assumpsit for money had and received for the use of the plaintiffs. (Record, p. 4.) On the 29th of January, the defendant filed his plea, that he did not undertake and promise as alleged. (Record, p. 5.) On the 25th of October, 1873, at the term when the case was tried, the defendant's attorney filed what he calls a notice that he would rely upon the following defenses:

1st. That the taxes were properly assessed.

2d. That no appeal was made to the Commissioner of Internal Revenue in manner and form as required by law.

3d. That, if there was an appeal to the Commissioner, suit was not brought within six months from the date of the decision of the Commissioner, and within one year from the date of the filing the appeal. (Record, p. 5.)

The case was tried on the 6th of November, 1873. (Record, p. 6.)

The 19th Section of the act of July 13, 1866, chapter 184, is in these words: "That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect. *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal. (14 Statutes, 152.)

The petition of appeal from the illegal assessment to the Commissioner of Internal Revenue states all the facts touching the ownership of said cotton, that the cotton was of the crops of 1861 and 1862, and constituted acquets and gains under the Louisiana Code, and the decision of the Commissioner passed upon the points upon which the illegality of the assessment turned. (See petition, Record, p. 16, and opinion of Commissioner, Record, p. 22.)

ARGUMENT.

An appeal, it will be noticed, was taken in this case from the *illegal assessment* to the Commissioner of Internal Revenue, upon the very grounds upon which its illegality was admitted by the court below, and those grounds were decided by the Commissioner adversely to the plaintiffs in error, the tax payers. The new assessment was made out in accordance with these rulings, and paid under written protest, the protest reciting, among others, the original grounds of appeal. This suit was brought *within six months* after the illegal taxes were collected. The first, and, as we submit, obvious error of the learned District Judge was, in sticking to the letter of the act of Congress, not its spirit, and charging that the suit must be brought within six months from the appeal from the illegal *assessment*, whether the plaintiffs had any right of action within that period or not.

Prior to the act of the 13th of July, 1866, the tax payer, if illegally assessed, might have maintained an action of assumpsit against a collector to recover back the amount, if he paid it under protest, although he had not taken an appeal to the Commissioner of Internal Revenue. Collector *vs.* Hubbard, 12 Wall., 13; Philadelphia *vs.* Collector, 5 Wall., 730. By the act of the 13th of July, 1866, (14 Statutes, p. 111,) the right to question the illegality of the assessment. *or collection* of taxes by suit is expressly given to the tax payers. Nichols *vs.* United States, 7 Wall., 130. The right of action, it is true, is dependent upon the tax payer first taking an appeal to the Commissioner of Internal Revenue from the illegal assessment, or collection, and bringing his suit within a limited time after the right of action accrues. In this case, the appeal was taken from the illegal assessment, and action was brought against the collector within six months after the right of action accrued. The object and intention of the act of Congress have been fully complied with, and its spirit met. The learned District Judge was of opinion, as shown by his refusal to allow the second instruction asked for, (Record, p. 26,) that a second appeal to the Commissioner

was necessary before suit could be brought. There must be an adherence to the letter of the law, no matter how useless might be the forms.

The original assessment was made on the 10th of May, 1867. The appeal was taken on the 17th of June, 1867. The Commissioner made his rulings on the 7th of October, 1867. The new assessment was not made until the 15th of March, 1868. If the assessor had only postponed his new assessment three weeks longer, more than six months would have elapsed from the time of the Commissioner's decision, and, according to the letter of the law, the right of action would have been gone forever, even before any right of action against anybody had accrued. The error of adhering to the letter of the law is equally glaring in the case as it now stands. There was an appeal, adverse ruling on the points now in controversy, though favorable in other important respects, a new assessment, and suit brought within six months after action accrued against the collector, yet the plaintiffs have lost their right of action by not suing within six months after the Commissioner's decision, although within these six months, the plaintiffs had no right of action whatever against the collector. There is an estoppel, because suit was not brought to conform to the letter of the law, before there was any right of action whatever. It is respectfully submitted that a construction which involves such contradiction, must necessarily be erroneous.

The Act of Congress gives, as we have seen, an action to the tax payer against the tax collector for taxes illegally collected under protest. This action can not be brought until there has been an appeal to the Commissioner to obtain his opinion upon the matters of protest. But this appeal, both by the express provisions of the law, and by the instructions of the Secretary of the Treasury regulating these matters, may be made from the assessment, and before the tax is collected. (See circular of the Department, No. 64, under date of the 13th of July, 1867, under which the appeal in this case was made.) If the appeal be thus taken, and the points in controversy ruled upon by the Commissioner, a second appeal from the new assessment would be a useless form, and an unnecessary expense. The law having been complied with, there is then no bar to the right of action of the tax payer against the collector, who collects the illegal tax, nor any limitation of action other than the statutes of the State in which

the suit is brought, applicable to the action. *Brauen* vs. *Sauerwein*, 10 Wall., 218. But the suit in this case was brought within six months after the payment of the tax complained of. So, the spirit of the law has been fully and fairly met and complied with.

A second error of the learned District Judge, was in ignoring the right of action conceded against the collector by the Act of Congress for taxes illegally collected. He charges the jury directly, that if the jury should believe that the decision of the Commissioner was made within six months from the time when the appeal was taken, then the plaintiffs must have brought their action within six months from the date of that decision. (Rec., p. 27.) But the plaintiffs had no right of action at all against the defendant, the collector, within the six months from the date of the decision. For, no part of the tax was paid until April 30, 1867, more than six months after the decision, and the greater part was not paid until July 25, 1868. (Rec. p. 26.) The charge was, therefore, equivalent to saying to the jury, that they must find for the defendant, unless they found that the plaintiffs had brought their suit before they had any right of action whatever against the defendant.

If the action had been against the assessor, provided an action could have been maintained against him, the charge might have been correct. In an action against the collector, it seems clearly erroneous.

The entire charge of the learned Judge is confined to an illegal *assessment*. When, he says, a person feels that he has been "illegally and erroneously *assessed*," he must appeal, etc., and sue within six months, etc But the suit is for taxes illegally *collected*, a right of action for which is given by the Act of Congress, and there was an appeal to the Commissioner. Under these circumstances, he should have charged the jury, as he was requested to charge, that the plaintiffs had no right of action against the defendant as collector until the taxes were actually paid; and, if they had taken an appeal to the Commissioner, they had complied with the pre-requisite to the commencement of suit, and were entitled to sue. The condition of the Act of Congress had been complied with, and there was no limitation to the action.

But the spirit of the Act of Congress seems to require the suit against the collector to be brought promptly, and the plaintiffs' instructions concede the fact, and were shaped to meet this view.

The Judge was asked to charge: "That the plaintiffs in this case had no right of action against the defendant, until the assessment was actually paid, and the action having been brought within six months from the payment under protest, the action is not barred by anything contained in the 19th Section of the Act of July 13th, 1866." This instruction, which was refused, goes upon the idea that the spirit of the Act of Congress requires the construction, that the suit must be brought within six months from the decision of the Commissioner, provided the plaintiffs were then entitled to bring suit, and, if not, *within six months after the right of action accrued.* Obviously, this is within the equity or spirit of the law.

That Congress did not understand itself as limiting the right of action of the citizen for illegal taxation within the narrow bounds marked out by the charge of the learned District Judge in this case, is evidenced by the 44th Section of the Act of Congress of the 6th of June, 1872, No. 206, page 275 of the Pamphlet Acts of Congress. And, at any rate, that section is an enabling act authorizing the present suit. The section reads as follows: "That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it was alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty, shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after. *Provided*, That actions for claims which have accrued prior to the passage of this Act, shall be commenced in the courts, or presented to the Commissioner of Internal Revenue within one year from the date of said passage. And, *Provided further*, That where a claim shall be pending before said Commissioner, the claimant may bring his action within one year after such decision, and not after. And, *Provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained."

W. F. & H. COOPER,

Solicitors for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

WILLIAM A. CHEATHAM ET UX., PLAINTIFFS IN ERROR,
vs.
HENRY L. NORVELL, COLLECTOR, &C. } No. 160.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Brief for the Defendant in Error.

In the Supreme Court of the United States.

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Brief for the defendant in error.

STATE OF THE CASE.

Even if the plaintiffs' statements, upon pages 3 to 6 of their brief, are literally true, as occurrences that did transpire as there narrated, they do not make a concise abstract of *such* facts only as pertain to the questions involved. These may be briefly stated, thus: May 10, 1867, an internal-revenue tax was assessed against the female plaintiff which she claimed to be erroneous and, upon the refusal of the assessor to make any abatement, she appealed, June 17, 1867, to the Commissioner of Internal Revenue, who, upon the 7th day of October, 1867, directed *a new assessment* to be made, which was done March 15, 1868, the amount being reduced from

$99,726 (the sum first assessed) to $29,971.91. No appeal was ever taken from *this* last assessment; *i. e.*, the appeal aforesaid of June 17, 1867, was the only one ever taken; and this tax was paid to the defendant, as collector of internal revenue, under protest, in three instalments, April 30, July 25, and October 30, 1868. This suit to recover the amount thus paid was instituted January 15, 1869. (Record, 25.)

All the other facts alleged are immaterial, since the only question involved, under the errors assigned, is the true construction of the act of July 13, 1866, c. 184, § 19, (14 Stats. at Large, 152,) recited upon the fifth page of the plaintiffs' brief.

The defendant's plea appears upon page 5 of the record, asserting (under the general issue) the regular assessment and collection of the tax; that no appeal was taken; and no suit brought within six months of the Commissioner's decision aforesaid.

BRIEF.

I.

This action is *assumpsit*, waiving all torts. Aside from the statute under discussion, it would not lie against the collector, bound to collect every tax regularly committed to him, whose warrant of commitment is a protection against all illegalities but his own. (Erskine *v.* Hohnbach, 14 Wallace, 616; Nowell *v.* Tripp, 61 Maine, 428, and cases cited.)

II.

To the maintenance of any suit to recover back an internal-revenue tax, an appeal and a decision by the

Commissioner are, as the judge ruled, conditions precedent. (Record, 22, 27. Erskine *v.* Hohnbach, 14 Wallace, 616.)

No appeal was taken from the tax here sought to be recovered. What was this tax? One for $29,971.91, assessed March 15, 1868, assessed against *Adelivia* Cheatham only. There was a tax of $99,726, assessed May 10, 1867, against *both* plaintiffs, (according to plaintiffs' statement, p. 4 of brief, which must be wrong, however,) upon which an appeal was taken and sustained, no attempt being made to collect that tax, with which this defendant never had aught to do.

It is nothing to the purpose to argue that an appeal from the tax assessed March 15, 1868, would *probably* have been ineffectual in procuring a decision preventing its collection. (Moke *v.* Barney, 5 Blatch., 277.) The chances of success or failure cannot relieve the tax-payer from the consequences of an omission to comply with the statute pre-requisites to the maintenance of an action. It is from the assessment of the very tax sought to be recovered that the appeal must have been taken and decided. It is not sufficient that the Commissioner has made *a* decision in some other case, supposed to cover the principle involved in the one for which suit is brought. Such is both the letter and spirit of this act of June 30, 1864. Its provisions do not warrant any such distinction as is attempted to be made by the plaintiffs, since they are too plain to require construction, or to admit of any other than that given by the judge in his charge. It is the action of the tax-payer with reference to the special tax of which he complains that gives him the right to sue; not what he has done with reference to some other tax, nor what somebody

else may have done with regard to that tax. Suppose one of the plaintiffs' neighbors had been assessed under circumstances identically like those here stated, had duly appealed and obtained the Commissioner's decision, all of which proceedings had been promptly and correctly communicated to the plaintiffs; would that have supported this action? Yet the Commissioner's *views* would then have been as fully ascertained as they were by the plaintiffs' appeal from the first tax; the assurance as to the result of an appeal would have been the same in either case. In short, it is the Commissioner's *decision* upon the case before him, and not his *opinion* upon a general (or particular) principle of law, that must first be had; and this distinction, believed to be sound, answers the plaintiffs' whole argument. Where either a statute or the contract of the parties requires the decision of any designated person upon any particular point, without it the plaintiff cannot sustain his action. (United States *v.* Robeson, 9 Peters, 327; Avery *v.* Scott, 5 Ho. of Lords Cas., 811; Tredwin *v.* Holman, 1 Hurl. & Colt, 72; Braunstein *v.* Accidental Ins. Co., 1 Best & Sm., 782; Elliot *v.* Royal Exchange Co., 2 Exch., 237; Horten *v.* Sayer, 4 Hurl. & Nor., 643; Worsley *v.* Wood, 6 T. R., 710; Glenn *v.* Smith, 22 Eng. L. & Eq., 489; Brown *v.* Overbury, 34 Eng. L. & Eq., 610.)

The alleged protest to the collector can give no rights. Without it, they could recover a tax enforced by distraint, if the proper appeal had been taken; with it, they cannot recover, having taken no appeal.

In relation to customs-duties, a protest is required by law. Could an importer, without protesting, recover

excess of duties, because another merchant importing the same article had obtained an authoritative construction of the tariff law affecting it? Or even if he had himself procured such a determination of it, after protest, upon a previous importation of the same article? (Nichols *v.* United States, 7 Wallace, 122.)

In order to make *any* argument, the plaintiffs find it necessary to make important changes in the phraseology of the statute; just as it reads, it is our all-sufficient defense.

It is of no consequence that the tax was a hardship. It is only to enable parties to recover erroneous or illegal taxes that the act was passed at all. To recover legal ones is impossible; therefore, showing any illegality, however gross, only brings the case within the purview of the statute requiring an appeal, instead of taking it out of such statute.

EDWIN B. SMITH,
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